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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ROBERT K. WALLS, individually,)	Case No.: <u>16CV0242 WQHJLB</u>
Plaintiff)	MEMORANDUM IN SUPPORT
vs.)	OF MOTION TO DISMISS
)	PURSUANT TO
UNIRADIO CORP., a California)	RULE 12(b)(1) and (6)
Corporation,)	
Defendant.)	Date: Request for Date Pending
)	
)	

Defendant UNIRADIO CORP. ("UNIRADIO" or "DEFENDANT"), by its undersigned counsel, respectfully requests this Honorable Court dismiss Plaintiff's COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF FROM COPYRIGHT INFRINGEMENT ("COMPLAINT") with prejudice pursuant to Federal Rules of Civil Procedure Rule 12(b)(1) and (6). In support, UNIRADIO states as follows:

I. INTRODUCTION

Plaintiff filed this copyright infringement lawsuit against the wrong party, under the wrong law and in the wrong jurisdiction. Plaintiff (an Australian citizen), filed this copyright infringement action challenging the alleged use of a purportedly copyrighted image (“Image”) in connection with a Mexicali, Mexico, Spanish language news story that was run on March 11, 2015 on a Mexican news website. (Complaint ¶¶19, incorporating Exhibit 2)

Readily available and easily accessible public records clearly establish that the Mexican news website is a service offered by a decades-old Mexican media corporation with its headquarters and operations in Tijuana, Mexico. Mexico has subject matter jurisdiction over this dispute; United States law is not applicable and this Court has no jurisdiction to adjudicate Plaintiff’s claim. Therefore, it must be dismissed pursuant to Federal Rules of Civil Procedure Rule 12 (b)(1).

Dismissal with Prejudice is further warranted under Federal Rules of Civil Procedure, Rule 12(b)(6) because Plaintiff failed to allege sufficient facts to state a claim against Defendant upon which relief can be granted. Plaintiff’s deficient pleading is essentially just a rote recitation of the elements of a copyright infringement claim under United States copyright law, 17 U.S.C. §101, *et seq.* Plaintiff fails to allege sufficient facts establishing his ownership of copyrights in the Image at issue (Exhibit 1) and does not allege a single fact that Defendant had access to, copied, displayed, published or otherwise used the image. Plaintiff’s Complaint does not contain facts

sufficient to state a cause of action against Defendant upon which relief may be granted and is therefore appropriately dismissed pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6).

II. ARGUMENT

Plaintiff's Complaint is a factual desert. Out of a total of 28 allegations, the chart below illustrates that only the following 8 paragraphs contain factual allegations (as opposed to a recitation of legal elements or conclusory allegations):

Paragraph #	Summary of Factual Allegations	Relevance
5	Alleges defendant is a business entity, incorporated in the state of California and with its principal place of business in California	Jurisdiction and Venue
8,9,11, 14,	Plaintiff resides in Australia, is a professional photographer is a copyright owner	Damages
15	Plaintiff took the Image attached as Exhibit 1	Copyright
17	Plaintiff registered the Image with the United States Copyright Office under registration number VA 1-789-507	Copyright
20	Defendant used the image on its business websites from March 11, 2015 to the present, see Screenshots of Defendant's use of the Image –Exhibit 2	Use

The above chart illustrates that a single allegation (Complaint ¶20), and the Exhibit it incorporates summarizes the entirety of the conduct Plaintiff is challenging. The very same allegation, however, establishes that this Court lacks subject-matter jurisdiction and should dismiss the Complaint pursuant to Rule 12(b)(1). Moreover, as the chart above illustrates, there are only 3 allegations in the entire Complaint that have any potential relevance in establishing copyright infringement. Those three allegations are

1 simply insufficient to meet even the most minimalist pleading standard. Plaintiff's
2 Complaint should be dismissed under Rule 12(b)(6) because he fails to adequately plead
3 facts of ownership of a valid copyright and copying of the protected aspects of the work
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5 by Defendant. *See Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir.2004)

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7 **A. Lack of Subject-Matter Jurisdiction Requires Dismissal Under Federal Rules of**
8 **Civil Procedure 12(b)(1)**

9 This Court does not have subject matter jurisdiction over a dispute between an
10 Australian citizen and a Mexican corporation for conduct that occurred in Mexico.
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12 Plaintiff sets forth the challenged conduct he asserts gives rise to his copyright
13 infringement claims in ¶ 20 of the Complaint, which incorporates Exhibit 2 as
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15 Defendant's alleged "use." Exhibit 2 consists of two copies of incomplete and
16 unauthenticated screenshots from news websites that are owned and operated by the
17 well-established Mexican news media company Uniradio S.A. de C.V. ("Uniradio
18 Mexico"), Gral. Manuel Márquez de León No. 950 Zona Río Tijuana, B.C., 22010 .The
19 screenshots purport to establish that the Image at issue in the lawsuit was displayed, in
20 connection with a news story run on March 11, 2016, on the Spanish language Mexican
21 news website serving Mexicali, Mexico, which is owned and operated by Uniradio
22 Mexico. Conspicuously, the screenshot of www.unimexicali.com is incomplete and the
23 part that is missing from the screenshot is the bottom-half of the page that advises that
24 the website is a news service provided by Uniradio Mexico and Uniradioinforma.com.
25
26 Exhibit 2 does not connect Defendant in any way to the challenged conduct; rather, it
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1 establishes that the entire basis for Plaintiff's claim is challenged conduct occurring
2 outside of this Court's jurisdiction- in Mexico and in connection with a Mexican owned
3 news website serving a Mexicali, Mexico demographic.
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5 **B. Dismissal is Appropriate Pursuant to Federal Rules of Civil Procedure 12 (b)(6)**

6 In order to survive a motion to dismiss under Federal Rule of Civil Procedure
7 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a
8 claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 663
9 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). It is not
10 sufficient for a complaint to "plead [...] facts that are 'merely consistent with' a
11 defendant's liability." *Id.* (quoting *Twombly*, 555 U.S. at 557). Furthermore, "[a]
12 pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of
13 a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). "Nor does a
14 complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual
15 enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). Rather, "[a] claim has facial
16 plausibility when the plaintiff pleads factual content that allows the court to draw the
17 reasonable inference that the defendant is liable for the misconduct alleged." *Id.*
18 (quoting *Twombly*, 550 U.S. at 556). Although the Court must accept factual allegations
19 in a complaint as true, it "[is] not bound to accept as true a legal conclusion couched as
20 a factual allegation." *Twombly*, 550 U.S. at 555.
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23 In order to set forth a copyright infringement claim, a plaintiff must show that (1)
24 he owns a copyright in a work and (2) defendant copied protected elements of the work.
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1 *See Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361, 111 S.Ct.
2 1282, 113 L.Ed.2d 358 (1991); *Morris v. Young*, 925 F. Supp. 2d 1078, 1082 (C.D. Cal.
3 2013); *Swirsky v. Carey*, 376 F.3d 841, 844 (9th Cir. 2004), *as amended on denial of*
4 *reh'g* (Aug. 24, 2004) (emphasis added). Plaintiff established neither requisite element.

6 **1. Plaintiff Fails to Allege Sufficient Facts of Copyright Ownership**

7 Plaintiff must allege sufficient facts establishing ownership of a valid copyright.
8
9 17 U.S.C. § 411(a). It is an essential element of a copyright infringement claim.

10 Plaintiff's Complaint is peppered with conclusory allegations that he has "ownership
11 and copyrights to the image," but he only offers the following two facts that are together
12 insufficient to adequately plead requisite copyright: (1) he took the Image (Complaint
13 ¶15) and (2) he registered the Image with the United States Copyright Office under
14 registration number VA 1-789-507.
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17 Plaintiff alleges that he "took" the Image in Exhibit 1, an unauthenticated rather
18 standard looking image of a wine glass, (Complaint ¶ 15), the fact that Plaintiff "took"
19 the Image is so vague that it establishes nothing. Plaintiff does not allege any facts
20 indicating how he "took" the image (by what methods), where, how, when or for what
21 purposes the original image was created. The Complaint also does not allege Plaintiff
22 independently created the image. It simply attaches an Image and alleges Plaintiff
23 "took" the image and registered the image under registration number VA 1-789-507.
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1 The reference to a certificate of registration, while more specific than the
2 unauthenticated Image, here also fails to carry the Plaintiff's pleading burden. *See*
3 Exhibit A (certificate of registration). As with the incomplete screenshot, the failure of
4 Plaintiff to attach a copy of the certificate of copyright registration is suspect and some
5 courts have dismissed pleadings that failed to incorporate the certificate of copyright
6 registration. *See DiMaggio v. Int'l Sports Ltd.*, No. 97 Civ. 7767(HB), 1998 WL
7 549690, at *2 (S.D.N.Y. Aug. 31, 1998); *Kelly v. L.L. Cool J*, 145 F.R.D. 32, 36
8 (S.D.N.Y.1992); *Vargas v. Pfizer, Inc.*, 418 F. Supp. 2d 369, 373 (S.D.N.Y. 2005).
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12 This Court should either dismiss this case based on a failure to attach the
13 copyright certificate, or it should consider the contents of the certificate number alleged
14 in Plaintiff's Complaint, since the existence of a valid copyright is an essential element
15 of a copyright infringement claim and can therefore be considered in deciding a Rule
16 12(b)(6) motion. Here, the contents of the certificate of copyright registration, number
17 VA 1-789-507, does in fact contain important information, such as:
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- 20 1) Title: "7 Published Images of Pouring Red Wine & Glass";
- 21
- 22 2) Under the section "contents" there are a number of different letters and
23 numbers, as well as the word "Copy";
- 24
- 25 3) It is categorized as "Visual Material" and there is no indication whether the 7
26 images are a collection or have been arranged in a manner that constitutes a
27 single work with various constituent parts;
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1 4) Date of first publication: July 11, 2005

2 5) Date of creation: 2005;

3 6) Date of May 9, 2011; and

4 7) Nation of First Publication: United Kingdom.

5
6 The contents listed above raise a number of questions regarding the validity of
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8 the alleged copyright. The work is not a U.S. work and it was first published in the
9 United Kingdom in 2005. The certificate of copyright registration was issued on May 9,
10 2011, more than 5 years from the date of first publication and therefore does not convey
11 presumptive validity on the copyright. The Copyright Act provides that a “certificate of
12 a [copyright] registration made before or within five years after first publication of the
13 work shall constitute prima facie evidence of the validity of the copyright.” 17 U.S.C. §
14 410 (c); *Entm’t Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F. 3d 1211,
15 1218 (9th Cir. 1997; *Lamps Plus, Inc., v. Seattle Lighting Fixture Co.*, 345 F.3d. 1140,
16 1144 (9th Cir. 2003). Since it was not issued within five years of first publication, it is
17 not prima facie evidence of the validity of the copyright and therefore additional
18 allegations supporting the existence of a valid copyright are required. Plaintiff provided
19 none.
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24 Additionally, the “Title” on the certificate of copyright registration suggests that
25 either a collection of Images was registered or a single work made up of various parts
26 (seven published images).17 U.S.C. § 101. (“ a work formed by the collection and
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1 assembling of preexisting materials or of data that are selected, coordinated, or arranged
2 in such a way that the resulting work as a whole constitutes an original work of
3 authorship.”) If the Image was included as a single image copyrighted as part of a
4 collective work, a different analysis of the validity of the copyright is applicable, than
5 would be applicable if the image was a constituent part of a single original work. For
6 example, it is long-established that, “The mere fact that a work is copyrighted does not
7 mean that every element of the work may be protected. Originality remains the *sine qua*
8 *non* of copyright.” *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348,
9 111 S. Ct. 1282, 1289, 113 L. Ed. 2d 358 (1991). Therefore, additional facts are
10 required.
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14 Importantly, there are no images associated with the certificate of registration and the
15 only way to verify whether the Image in Exhibit 1 is actually a part of the registration
16 would be to view the certified deposit records from the United States Copyright Office.
17 Plaintiff did not attach such deposit records. Although not required to attach the deposit
18 records to the Complaint, if the Image is in the deposit records, Plaintiff could have had
19 some factual support for his allegations of ownership of a valid copyright in the Image.
20 Further, even when a federal certificate of copyright registration is attached to a
21 complaint, if the federal certificate of copy right “does not provide sufficient detail to
22 identify the covered images,” courts have required more. *See Alaska Stock, LLC v.*
23 *Pearson Educ., Inc.*, 975 F. Supp. 2d 1027 (D. Alaska 2013) (finding certificate of
24 registration inadequate where, each certificate merely provides a series of numbers and
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1 letters as the “Title of Work,” and lists “photograph(s)” as the work created by the
 2 author.) Here, Plaintiff’s Complaint is bare bones, and fails to provide any factual detail
 3 to support his legal conclusions of ownership or the existence of a federal copyright
 4 registration.
 5

6 **2. Plaintiff Failed to Allege Defendant had Access to, Copied, Published Displayed**
 7 **or Otherwise Used the Image at Issue.**
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9 Plaintiff alleges that UNIRADIO is a proper party to this cause of action without
 10 alleging a single fact connecting UNIRADIO to the Image, the website that purportedly
 11 displayed the image or otherwise setting forth how UNIRADIO allegedly accessed,
 12 used or infringed upon Plaintiff’s allegedly copyrighted Image. *See generally*
 13 Complaint. Instead, Plaintiff merely states, as a legal conclusion, that UNIRADIO
 14 violated Plaintiff’s copyrights, and references an unauthenticated and incomplete screen
 15 shot purportedly from www.unimexicali.com. *See* Plaintiff’s Exhibit 2. Plaintiff does
 16 not allege UNIRADIO owns the website. *See generally* Complaint. In fact, Plaintiff’s
 17 own complaint suggests that Plaintiff is unsure if Defendant is the proper party to this
 18 cause of action. Plaintiff’s complaint merely states “Plaintiff is informed and believes,
 19 and thereon alleges, that Defendant is a business entity that unlawfully published
 20 Plaintiff’s copyrighted works ...” *Id.* at ¶ 3. However, Plaintiff never alleges any facts
 21 sufficient to explain how Plaintiff arrived at this legal conclusion. *See generally Id.* The
 22 only fact supporting finding that the Image may have been used is the unauthenticated
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1 and incomplete screenshots in Plaintiff's Exhibit 2, from a website Plaintiff cannot, and
2 does not, allege to be owned, controlled, or otherwise related to UNIRADIO.

3 In addition to failing to allege any facts connecting UNIRADIO to the website
4 www.unimexicali.com, Plaintiff's Complaint fails to allege *any* facts establishing
5 UNIRADIO had any access to or copied the Image at issue in this litigation. Proof of
6 access requires "an opportunity to view or to copy plaintiff's work." *Three Boys Music*
7 *Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir.2000) (quoting *Sid & Marty Krofft*
8 *Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1172 (9th Cir.1977)). "To
9 prove access, a plaintiff must show a reasonable possibility, not merely a bare
10 possibility, that an alleged infringer had the chance to view the protected work." *Art*
11 *Attacks Ink, LLC v. MGA Entm't Inc.*, 581 F.3d 1138, 1143 (9th Cir.2009). *L.A. Printex*
12 *Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 846 (9th Cir. 2012), *as amended on*
13 *denial of reh'g and reh'g en banc* (June 13, 2012). The Ninth Circuit defines a
14 reasonable opportunity as "more than a 'bare possibility'." *Three Boys Music Corp. v.*
15 *Bolton*, 212 F.3d 477, 481 (9th Cir.2000) (quoting *Jason v. Fonda*, 698 F.2d 966, 967
16 (9th Cir.1982)).

17 Plaintiff's Complaint does not allege: where the Image is available for viewing,
18 when it was available for viewing, what format the Image is available to be viewed in or
19 any other facts establishing access or copying. If the Image is in digital form, there
20 should be some metadata associated with the image and other means of tracking its use
21 electronically. Plaintiff does not allege whether Defendant had access to a digital
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1 version, scanned a physical copy, or by what means or method Defendant was able to
2 publish or display the image. It is not enough for Plaintiff to make the vague and
3 conclusory allegation that copying occurred; rather, Plaintiff must specify how
4 UNIRADIO could have accessed the Image, as well as specific facts regarding copying.
5 *Media.net Advert. FZ-LLC v. NetSeer, Inc.*, No. 14-CV-03883-EMC, 2016 WL 141707,
6 at *11 (N.D. Cal. Jan. 12, 2016).
7

8 **III. CONCLUSION**

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10 For all the foregoing reasons, Defendant respectfully request that the Court
11 dismiss Plaintiff's claim pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6).
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14 Dated: March 7, 2016

Respectfully submitted,

UNIRADIO, CORP.

By: /s/Cameron J. Gharabiklou

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CERTIFICATE OF SERVICE

I, Cameron J. Gharabiklou, an attorney, certify that the foregoing document was electronically filed with the Court's CM/ECF system, which will send automatic notification to the following counsel of record:

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